

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
) CC Docket No. 98-79
GTE Telephone Operators)
GTOC Tariff No. 1)
GTOC Transmittal No. 1148)

Comments in Support of GTE's ADSL Tariff

Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (the "SBC LECs") file these Comments in support of GTE's Asymmetrical Digital Subscriber Line ("ADSL") tariff. The jurisdictional issues designated for investigation in GTE's Designation Order¹ are the same that were in the designation order on Pacific Bell's interstate ADSL tariff.² For the reasons set forth in Pacific's Direct Case filed September 11, 1998, in CC Docket No. 98-103, GTE's ADSL service is an interstate service appropriately tariffed with and before the FCC.

As with Pacific's service, GTE's ADSL service will be used to establish Internet connections through Internet service providers ("ISPs"). Internet traffic involves interstate traffic, as has been concluded by numerous courts and agencies including the Commission. Beginning in 1983 and continuing today, the Commission has premised its enhanced service provider ("ESP") exemption on the grounds that Internet traffic like that to be carried by the

¹ *GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Transmittal No. 1148, Order Designating Issues for Investigation*, CC Docket No. 98-79 (CCB August 20, 1998).

² *Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Bell Transmittal No. 1986, Order Designating Issues for Investigation*, DA 98-1772, CC Docket No. 98-103 (CCB September 2, 1998).

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ADSL service would otherwise be subject to interstate access rates. That conclusion reflects the fact that the jurisdiction of traffic is determined based upon its end-to-end nature. Here, ADSL service will be used to establish connections through ISPs to the Internet for end-to-end communications around the world.

The packet technology used for Internet traffic and the logical assignment of data addresses prevents segregating the mixed traffic on the Internet, *i.e.*, intrastate, interstate, and international traffic, by jurisdiction. The "mixed facility" or "inseverability" doctrine thus places that traffic within the exclusive jurisdiction of the FCC. For that reason, and in any event due to the undeniable interstate traffic involved, GTE's interstate ADSL tariff is appropriate.

Further, the FCC should not defer to the States on the regulation of interstate ADSL service. The Commission will be able to address any "price squeeze" or other concerns as they arise, and those concerns can be addressed in tariffing proceedings or by complaint.

A copy of Pacific Bell's Direct Case is attached.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY
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September 18, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Pacific Bell Telephone Company)
Pacific Bell Tariff FCC No. 128)
Pacific Bell Transmittal No. 1986)

CC Docket No. 98-103

DIRECT CASE OF PACIFIC BELL

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September 11, 1998

Table of Contents

SUMMARY	i
I. THE JURISDICTION OF PACIFIC's ADSL SERVICE DEPENDS UPON ITS USE	2
II. USE OF PACIFIC's ADSL SERVICE TO CARRY JURISDICTIONALLY MIXED INTERNET TRAFFIC MAKES THE SERVICE JURISDICTIONALLY INTERSTATE	3
A. Internet Traffic between Pacific's ADSL Subscriber and an ISP Includes Interstate Traffic	4
B. Mixed Internet Traffic is Not Severable	10
C. ADSL Service is an Exchange Access Service	13
D. The Commission Can Deal with Any "Price Squeeze" Concern	15



SUMMARY*

With its Direct Case, Pacific demonstrates that its ADSL service is an interstate offering properly before the FCC. There is also no need to defer to the States due to "price squeeze" or other concerns.

As a transmission service, jurisdiction over ADSL does not inherently reside on one side of the section 2(b) jurisdictional split or the other. The use of ADSL will dictate the proper jurisdiction. For example, "work at home" use of ADSL might consist of pure intrastate traffic or no more than a *de minimis* amount of interstate traffic, thus making a purchase from intrastate tariffs entirely appropriate. Pacific has filed an intrastate tariff to address such uses.

Pacific's ADSL service will also be used to establish Internet connections through ISPs. Internet traffic involves interstate traffic, as has been concluded by numerous courts and agencies and particularly the FCC. Beginning in 1983 and continuing today, the Commission has premised its ESP exemption on the grounds that Internet traffic like that to be carried by the ADSL service would otherwise be subject to interstate access rates. That conclusion reflects the fact that the jurisdictional nature of communications traffic is determined based upon the end-to-end nature of the traffic. ADSL service will be used to established connections through ISPs to the Internet for end-to-end communications around the world and, contrary to assertions by Pacific's competitors, does not involve "two calls."

The packet technology used for Internet traffic and the logical assignment of addresses prevents segregating the mixed traffic on the Internet, *i.e.*, intrastate, interstate, and international

* The abbreviations used in this Summary are as defined in the main text.

traffic, by jurisdiction. The "mixed facility" or "inseverability" doctrine thus places that traffic within the exclusive jurisdiction of the FCC. For that reason and in any event due to the undeniable interstate traffic involved, Pacific's interstate ADSL tariff is appropriate.

Pacific's ADSL service is classified as an exchange access service under Commission rule as supported by the Advanced Services Order.

There is no reason for the FCC to defer to the States on the regulation of interstate ADSL service, whether due to "price squeeze" concerns or otherwise. Any such concerns will undoubtedly be raised where they may arise, and can be addressed in tariffing proceedings like this one or by complaint. Pacific has no doubt that the FCC has the expertise and tools to address any such concern. Also, the Act neither contemplates nor permits the FCC to cede jurisdiction to the States on interstate services that can be duplicated by UNEs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Pacific Bell Telephone Company)	CC Docket No. 98-103
Pacific Bell Tariff FCC No. 128)	
Pacific Bell Transmittal No. 1986)	

DIRECT CASE OF PACIFIC BELL

Pacific Bell ("Pacific"), pursuant to the Order Designating Issues for Investigation released September 2, 1998, by the Common Carrier Bureau,¹ files its Direct Case in this matter. Pacific's Asymmetrical Digital Subscriber Line ("ADSL") service is an interstate offering properly before the Commission, and there is no need to defer to the States whether due to "price squeeze" concerns or otherwise.

By way of background, Pacific's ADSL service is a modem-based technology that adds high-speed data capability over traditional local exchange service. Using an ADSL modem typically located in the local exchange end-user's serving wire center (the "Digital Subscriber Line Multiplexer" or "DSLAM") connected to a compatible modem at the customer's premises (which is customer premises equipment), the ADSL service establishes a high-speed data transmission path, which is connected to Pacific's fast-packet network. Once the path is

¹ Order Designating Issues for Investigation (Com. Car. Bur., released September 2, 1998) ("Designation Order").

established, a permanent virtual channel ("PVC") is created on that packet network to a destination which has been previously requested by the ADSL customer. The data path created with the PVC is always available, seven days a week, 24 hours a day, giving the ADSL subscriber the highly desirable "always on" feature. Although provisioned on a packet-based technology, the ADSL service provides the same dedicated functionality as a traditional special access circuit.

I. THE JURISDICTION OF PACIFIC'S ADSL SERVICE DEPENDS UPON ITS USE

Like other transmission services and technologies, jurisdiction over ADSL service does not inherently reside within one jurisdiction or the other. Rather, the interstate or intrastate use of Pacific's ADSL service will dictate jurisdiction. For example, a typical application for Pacific's ADSL service would be "work at home," where a subscriber could connect to a corporate local area network (LAN) to access her employer's Intranet and her work computer. Such applications could consist of purely intrastate communications, thus making Pacific's ADSL service jurisdictionally intrastate. Accordingly, as had been noted in advance in its Reply filed June 26, 1998, to oppositions to the subject tariff, Pacific has filed an intrastate tariff with the California Public Utilities Commission to offer ADSL.² When a customer's intended use of ADSL involves purely intrastate communications or perhaps no more than a *de minimis* amount

² Advice Letter No. 19543, filed July 7, 1998. Resolution T-16191, provisionally approving the Advice Letter is on the California Commission's agenda for September 17, 1998.

of interstate traffic,³ purchase of Pacific's ADSL service from an intrastate tariff is entirely appropriate.

Pacific's ADSL service will also be used to establish a PVC to Internet service providers ("ISPs") to obtain access to the Internet. That has been effectively confirmed by the involvement of the ISP community in this tariff proceeding.⁴ This use of ADSL involves interstate communications, thus making Pacific's ADSL tariff not only appropriate but indeed mandated by relevant statutes and FCC rules.

II. USE OF PACIFIC'S ADSL SERVICE TO CARRY JURISDICTIONALLY MIXED INTERNET TRAFFIC MAKES THE SERVICE JURISDICTIONALLY INTERSTATE

There is simply no reasonable or legitimate argument that can be made that Pacific's ADSL service does not involve interstate communications when used to connect to the Internet. Numerous courts and agencies -- foremost the FCC itself -- have concluded in widespread and unanimous fashion that the Internet consists of interstate and international communications. As the United States Supreme Court described it, "[t]he best known category of communication over the Internet is the World Wide Web, which allows users to search for and receive information stored in remote computers, as well as, in some cases, to communicate back to designated sites.

³ See Decision and Order, *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 78-72, 4 FCC Rcd 5660 (1989) (adopted a *de minimis* standard of 10% or less interstate traffic for determining the intrastate/interstate jurisdictional split for separations purposes).

⁴ Commercial Internet eXchange Association and America Online.

In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world.”⁵ Communications provides the connectivity between those computers, and ADSL can be used as a means of becoming part of that communications network.

The end-to-end communications made through the Internet using Pacific’s ADSL service can be intrastate, interstate, or international in nature. But as set forth herein, Internet traffic cannot be jurisdictionally separated technically or practically, and thus the “mixed facility” and “inseverability” doctrines bring jurisdictionally mixed Internet traffic within the exclusive jurisdiction of the FCC.⁶ Pacific’s ADSL service is jurisdictionally interstate when so used. Even without the application of that doctrine, Pacific’s ADSL service will be used to carry interstate traffic.

A. Internet Traffic between Pacific’s ADSL Subscriber and an ISP Includes Interstate Traffic

Most recently, in reviewing the Access Reform Order,⁷ the Eighth Circuit relied upon the FCC’s determinations and arguments that access to ISPs involve interstate traffic in upholding the continuation of the interstate access charge exemption (the “ESP exemption”) applicable to incumbent LEC-to-ISP traffic (“ISP traffic”).

⁵ Reno v. American Civil Liberties Union, 138 L.Ed. 2d 874, 885 (1997).

⁶ *See, e.g., Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989).

⁷ First Report and Order, Access Charge Reform, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997) (“Access Reform Order”).

As the FCC argues, the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements. See *California v. FCC*, 905 F.2d 1217, 1244 (9th Cir. 1990). Consequently, the FCC has determined that the facilities used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic. FCC Brief at 79.

Southwestern Bell Telephone Co. v. FCC, No. 97-2618, Slip Op., p. 41 (August 19, 1998). That conclusion came after the FCC specifically noted the application of the ESP exemption to ISPs that provide access to the Internet. Obviously, if interstate traffic was not involved, there would be no need for applying the ESP exemption.

Those conclusions only follow the longstanding approach taken by the FCC and the Courts in addressing the jurisdiction of ISP traffic and communications traffic generally. Under that jurisdictional approach, "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications."⁸ The focus of the analysis is on a communication "from its inception to its completion."⁹ For instance, where voice messages from other States were stored in a local voice messaging processor the fact that the messages originated outside the State made such an end-to-end communication jurisdictionally interstate even though the end-user retrieved the messages

⁸ Teleconnect Co. v. Bell Telephone Co. of Pennsylvania, 10 FCC Rcd 1626, 1629 (1995), *aff'd sub nom.*, Southwestern Bell Telephone Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997).

⁹ *Id.*, see also New York Telephone Co. v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980).

by placing a local call.¹⁰ That approach is also followed by State courts in determining interstate/intrastate jurisdiction disputes.¹¹ Thus, all pertinent authorities reach the same conclusion: where a communication begins and ends in different States, the Commission's jurisdiction does not end at the local switch but continues to the ultimate termination of the call.

With Pacific's ADSL service, the point of origin or "inception" is with the end-user. The point of "completion" is the destination point or points the subscriber reaches during the communication. When ADSL service is used to connect to the Internet through an ISP, a subscriber does not seek to only reach the ISP, but rather expects to communicate *through* the ISP to a destination on the Internet. Contrary to the assertions of Pacific's competitors, the communication obviously no more terminates with the ISP than a circuit-switched toll call terminates at the interexchange carrier's switch.¹² The ISP's equipment instead acts as an intermediate node or switch in a communications path to establish a direct, continuous

¹⁰ See Petition for Emergency Relief and Declaratory Ruling filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992), *aff'd* Georgia Public Service Comm'n v. FCC, 5 F.3d 1499 (11th Cir. 1993).

¹¹ See Southern Pacific Communications Company v. Corporation Commission of Oklahoma, 586 P.2d 327, 333 (Okla. 1978), where the Oklahoma Supreme Court held that local telephone lines, which had both their open and closed ends within Oklahoma, but which could be switched to a private line network between two States carrying communications of only one customer, were interstate services under the exclusive authority of the FCC.

¹² Accord Teleconnect Co., 10 FCC Rcd at 1629-30 ("an interstate communication does not end at an intermediate switch"). Even if the "two call" theory were to be accepted in the analogy of Feature Group A where a call is placed to a "local number," the jurisdiction of the Feature Group A is determined by the "2nd call" to the final destination. In fact, Pacific believes that without the ESP exemption, ISPs would be purchasing FGA.

connection to the Internet, typically the aptly named and highly descriptive "World Wide Web." Indeed, to those who push the "two call" analysis, Pacific suggests blocking access beyond the ISP equipment and see how many of the ISP's customers want to make the alleged "first call." Pacific suspects it would not be vastly more than the number of calling parties seeking to speak with an interexchange carrier's switch.

Using that transiting connection, the subscriber can communicate through an ISP with persons and points on the Internet throughout the world -- in a foreign country, in another State, within the same State, and even within the same exchange. And because the ADSL subscriber is always "on," the subscriber is assigned a permanent Internet address and *effectively becomes part of the Internet* -- a known destination point that any other person connected to the Internet can reach. A simplified diagram of ADSL service and the Internet is attached as Attachment A.

The interstate nature of Internet communications is well-settled, and totally undercuts any "two call" argument. Numerous FCC orders have rested on the foundation that ISP traffic -- traffic between a LEC and an ISP -- can be and indeed often is interstate traffic. A number of those FCC orders, as well as other supporting authorities, have been previously catalogued for the Commission.¹³

¹³ See May 8, 1998, letter from Ms. B. Jeannie Fry, Director - SBC Communications Inc., to Ms. Magalie R. Salas, Secretary, Federal Communications Commission, pertaining to CC Docket Nos. 80-286, 96-45, 96-262, and 97-30, Attachment, at Tab 1. A copy of the materials behind Tab 1 are attached hereto as Attachment B.

The orders date from at least 1983. That year, the FCC recognized the interstate nature of enhanced services traffic that transited enhanced services equipment and networks. The FCC then exempted ESPs from interstate access charges even though there was no question that other users using the local network in the same way were subject to such interstate charges. Consistent with the above, the Commission determined the jurisdiction of the communication by its physical origination and termination points:

Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, **enhanced service providers** and other private line and WATS customers, large and small, who "leak" traffic into the exchange. **In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area. At its own location the user connects the local exchange call to another service or facility over which the call is carried out of state.** These may consist either of owned or leased transmission capacity or a specific message service such as WATS. Depending upon the nature of its operation, a given private line or WATS user may or may not make significant use of local exchange service for interstate access. Thus, in the case in which a user connects an interstate private line to a PBX, some traffic may originate and terminate at the user location and other traffic may "leak" into the exchange in order that the calls can be completed at another location. A facilities-based carrier, reseller or **enhanced service provider might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers.**¹⁴

The rationale for exempting ESPs was grounded on providing relief from the otherwise applicable interstate access charges: "Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently

¹⁴ Memorandum Opinion and Order, MTS and WATS Market Structure, CC Docket No. 78-72 Phase I, 97 FCC 2d 682, 711-12 ¶ 78 (1983) (emphasis added).

paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operations which could affect their viability.” *Id.* at 715 ¶ 83 (emphasis added).

In 1988 the FCC continued to exempt ESPs from interstate access charges. *Order, Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988). And, as noted earlier, the Access Reform Order reflects but another assertion of Commission jurisdiction, albeit to maintain the interstate access charge exemption afforded ESPs for Internet traffic. Therein, the FCC specifically noted its application to ISPs who provide access to the Internet:

In the 1983 Access Charge Reconsideration Order, the Commission decided that, although **information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, ISPs should not be required to pay interstate access charges. In recent years, usage of interstate information services, and in particular the Internet and other interactive computer networks, has increased significantly.** Although the United States has the greatest amount of Internet uses and Internet traffic, **more than 175 countries are now connected to the Internet.** As usage continues to grow, information services may have an increasingly significant effect on the public switched network. As a result of the decisions the Commission made in the Access Charge Reconsideration Order, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.¹⁵

¹⁵ Access Reform Order, 12 FCC Rcd at 16131-32 ¶¶ 341, 342 (footnotes omitted) (emphasis added).

It is clear from these FCC orders, beginning in 1983 and re-affirmed this year, that ISP traffic is jurisdictionally interstate access traffic that, absent the exemption ordered by the FCC, would be subject to interstate access charges.

Just as clearly, the Commission implicitly rejected with each decision the notion that ISP traffic terminates at the ISP. Had that position been adopted by the Commission, it would have had no reason to exempt ISP traffic from interstate charges. The FCC's jurisdiction depends entirely on the fact that interstate traffic is involved. No distinction is drawn based on whether traffic is carried to its ultimate destination entirely over the public switched network and, indeed, cannot be without the FCC losing jurisdiction over the Internet.

B. Mixed Internet Traffic is Not Severable

Although ISP traffic clearly involves interstate communications, Pacific is unaware of any technical way to determine the physical location of a destination point on the Internet. Internet addresses are assigned logically, not geographically like telephone numbers (*i.e.*, NPA-NXX). For example, Internet addresses only one digit apart can be in different States or even different countries. Moreover, since Internet addresses are not assigned geographically, an address can be moved from one router to another, again in different States or even countries. Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites are increasingly being stored in multiple servers throughout the Internet, based on "caching" or website "mirroring" techniques. It is thus simply not possible

to determine whether the communication is intrastate or interstate when the location of the destination point is unknown.

The difficulty of determining the jurisdiction of any particular Internet connection or "call" is further increased by virtue of the Internet's packet-switched nature. Employing the Internet browsers used by most consumers (Netscape, Microsoft Explorer), an ADSL subscriber would be able to communicate simultaneously with multiple destinations around the world. The communications would be in real-time with other Internet users, by video, fax, or voice (*i.e.*, Internet telephony),¹⁶ or by typing into a "chat room." Communication could also take place by electronic messaging (e-mail). The ADSL subscriber connected through an ISP will also be able to access audio (such as radio broadcasts) and general data applications. Again, these activities -- some involving enhanced services, some pure telecommunications services -- can be engaged in simultaneously. It is not possible to separate the intrastate and interstate portions when the ADSL subscriber is simultaneously engaged in intrastate and interstate communication over the Internet.

In sum, as an empirical matter, it is not possible (i) to separate by jurisdiction the intrastate and interstate aspects of a single Internet call or connection in which an end-user sequentially communicates with multiple destinations, some intrastate, some interstate, and some

¹⁶ By statutory definition, Internet telephony is clearly a telecommunications service. Any use of the Internet to originate or receive an interstate or international call places that call within the Commission's jurisdiction. Thus, even if one believed there were any validity to the "two call" analysis, any use of Pacific's ADSL for Internet telephony would obliterate any claim that the "first call" terminated at the ISP.

international; (ii) to separate the intrastate and interstate aspects when the end-user is simultaneously engaged in intrastate, interstate, and international communications over the Internet; and (iii) to determine whether the call is intrastate or interstate when the location of the destination point is unknown.

Accordingly, the Internet is a "mixed use facility," and ISP traffic is a paradigm example of "jurisdictionally inseverable" traffic. Precedent establishes that where a facility is used to provide both intrastate and interstate services, and it is not possible to "separate" the uses of the facility by jurisdiction, such "mixed use" facilities are subject to the FCC's exclusive jurisdiction.¹⁷ For instance, private lines used to carry both intrastate and interstate traffic are a prime example of a mixed use facility that has been held to be subject to the exclusive jurisdiction of the FCC.¹⁸ Indeed, the Eighth Circuit indicated its understanding of the mixed nature of Internet traffic. Southwestern Bell Telephone Co., No. 97-2618, Slip Op., p. 41 (observing that "the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate"). The inseverability doctrine clearly supports the FCC's exclusive jurisdiction of mixed Internet traffic.¹⁹

¹⁷ See note 3 *supra*.

¹⁸ *Id.*

¹⁹ It should be noted that Pacific is not suggesting that Internet traffic that can be identified as purely intrastate in nature should be subject to FCC jurisdiction.

Even in the absence of "inseverability," however, Pacific's ADSL tariff is appropriate to address jurisdictionally interstate traffic, especially in light of the analogous Commission treatment of special access services. Because no rational basis exists to allocate the costs of a dedicated circuit between the jurisdictions, the FCC determined that a private line that carries more than a *de minimis* amount of interstate traffic (*i.e.*, more than 10% of the total traffic carried on the line) will be treated for separations purposes as interstate.²⁰ Pacific reasonably believes that there will be many users for its ADSL service that will transmit more than 10% interstate traffic and inasmuch as the ADSL service is a non-switched access service, purchases from an interstate tariff is more than warranted.

C. ADSL Service is an Exchange Access Service

In light of the controlling decisions described above that Internet traffic involves interstate communications, ADSL is an exchange access service. By Commission rule, an "access service" includes "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."²¹ This definition therefore rests on the nature of the transmission,²² not the identity of the purchaser or termination at an interexchange carrier's point-of-presence. After all, the FCC prohibits end-user restrictions on access services, and thus

²⁰ See note 3 *supra*.

²¹ 47 C.F.R. § 69.2(b).

²² See, *e.g.*, General Telephone of California v. FCC, 413 F.2d 390, 401 (D.C. Cir. 1969).

the alleged characterization of ISPs as end-users is beside the point.²³ ADSL is clearly a "telecommunications service" that will be used to originate and terminate interstate telecommunications.²⁴

This classification is further supported by the FCC's recent Advanced Services Order.²⁵ The FCC there decided that an advanced telecommunications service -- which specifically referred to and included ADSL²⁶ -- is either a "telephone exchange service" or "exchange access" under the Act. *Id.*, ¶ 40. The category into which ADSL falls is to be addressed on a "case-by-

²³ See Petition of First Data Resources, Inc. Regarding the Availability of Feature Group B Access Service to End Users, 1986 WL 291786 (May 28, 1986). Moreover, the Commission has never suggested that access services must be purchased by interexchange carriers.

²⁴ As noted in the Reply, MCI argues that Pacific is required to tariff its ADSL loop transmission service pursuant to the Commission's Expanded Interconnection orders, which apply to interstate access. See MCI at 3-4. Although MCI is correct that Pacific's ADSL service is an interstate access service, MCI's application of the Expanded Interconnection orders is not.

²⁵ Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Petition of Bell Atlantic Corp. for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of U S WEST Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, Petition of Ameritech Corp. to Remove Barriers to Investment in Advanced Telecommunications Technology, Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act, Petition of the Ass'n for Local Telecommunications Services for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91; CCB/CPD No. 98-15 RM 9244 (rel. August 7, 1998) ("Advanced Services Order").

²⁶ Advanced Service Order, ¶ 3 & n.5.

case" basis. *Id.* Given the interstate use of ADSL described earlier, ADSL cannot be a telephone exchange service; hence it must be an exchange access service.²⁷

D. The Commission Can Deal with Any "Price Squeeze" Concern

Also designated for comment is whether the "Commission should defer to the states the tariffing of retail DSL services in order to lessen the possibility of a price squeeze." Designation Order, ¶ 10. The "price squeeze" argument expressed by Northpoint is based upon the pricing of interstate ADSL service within the FCC's jurisdiction versus the pricing of unbundled network elements by the State commissions. The argument fails utterly, and the Commission should not defer to the States on Pacific's ADSL tariff.²⁸

Starting with the simplest reason, Northpoint appears to suggest that Pacific's competitors, the State commissions, and the FCC will each simultaneously somehow fail to notice or to address any price squeeze concerns that might arise, even though the ADSL and UNE prices are being paid by competitors, are filed with State commissions and thus within readily accessible public records. Pacific's experience is to the contrary. Pacific fully expects that price squeeze issues will be raised before the appropriate regulatory body, whether *sua sponte*, by end-users, or by competitors, and whether in tariff investigations such as this one or

²⁷ Neither Pacific nor any of its affiliates is hereby waiving or negatively affecting its ability to fully participate in any appeal or reconsideration of the Advanced Service Order, including this aspect of that Order.

²⁸ There is also the issue of whether the FCC has the authority to order the withdrawal of tariffs for interstate services, an issue that the Commission has been confronted with in ordering non-dominant interstate carriers to withdraw their tariffs.

through complaints. Pacific also does not believe that this Commission lacks the necessary expertise or tools in which to explore and address any legitimate price squeeze issue that might arise.

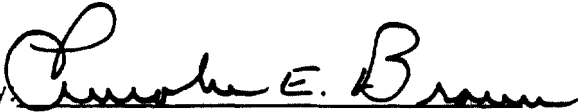
Second, boiled to its essence, Northpoint's argument is that the FCC should cede pricing jurisdiction for interstate services to the States because of their UNE pricing authority. After all, if the concern exists with interstate ADSL such that deference is appropriate, then the same concern must exist and the same deference should be accorded the States with interstate special and switched access generally. Those other interstate services can also be duplicated using UNEs. Of course, the 1996 Act contemplated no such result, but instead as the Act itself noted and the Courts have subsequently found, the section 2(b) jurisdictional divide is alive, well, and must be respected.

In short, there is nothing to suggest that the Commission cannot or will not fulfill its responsibility in the tariffing or complaint processes, including reviewing completely the costing and pricing data submitted by Pacific as required by Commission rule or order. The Commission

is fully able to address any price squeeze issue that is raised; deference for this interstate service is neither appropriate nor warranted.

Respectfully submitted,

PACIFIC BELL

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f Darryl W. Howard

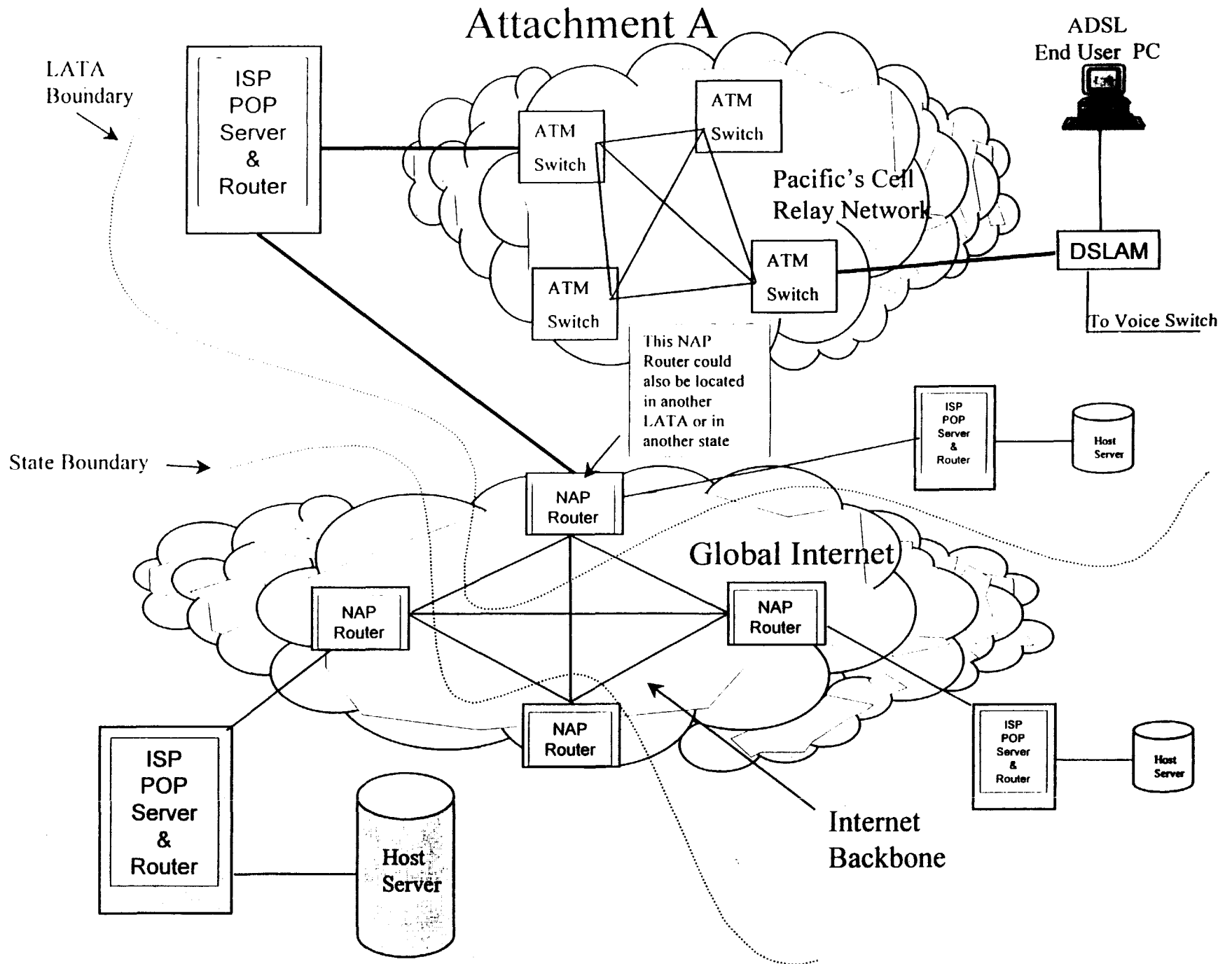
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INTERNET CALLS AND USAGE ARE UNDER THE JURISDICTION OF THE FCC

A. THE FCC ASSERTED ITS JURISDICTION OVER ALL INTERNET USAGE AND COSTS TO ACCESS THE INTERNET.

Beginning in 1983, the FCC asserted jurisdictional authority over rates, calls, usage and costs for access to the Internet.

- a) The FCC recognized that ESPs (and ISPs) use local exchange facilities (like IXCs and resellers) to complete interstate calls.
- b) The FCC recognized that all entities that used the local exchange network should pay for that use on a non-preferential and non-discriminatory basis.
- c) The FCC exercised its authority over Internet calls accessing the Internet by granting a transitional exemption from usage based access charges to (1) avoid rate shock and (2) allow usage measurement procedures to be developed to identify Internet usage.
- d) Under the FCC exemption, ISPs were treated as end users (only for access rate purposes) and were allowed to obtain network access by purchasing local business lines out of state tariffs.
- e) This FCC mandated network access allowed customers to dial seven digits to reach the Internet and initially (as with FGA) traditional jurisdictional measurement procedures assigned this usage to local (because seven digits, not 1+ or 0+, were dialed).

In the March 25, 1998 Ex Parte letter from SBC to the FCC on pages 2 to 8, are brief excerpts from FCC orders dealing with ESP and ISP Internet usage that clearly show that the FCC, over a period of nearly 15 years, viewed this usage to be interstate and under its jurisdiction. The FCC continued to exercise this jurisdictional authority in its First Report and Order, Released May 16, 1997, In the Matter of Access Charge Reform, etc., Docket Nos. 96-262, 94-1, 91-213 and 95-72. In this current Order, the FCC stated:

1. "The term 'enhanced services', which includes access to the Internet". 'Enhanced services' are defined in § 64.702(a) of our rules: 'For the purposes of this subpart, the term *enhanced services* shall refer to services, offered over common carrier transmission facilities used in interstate communications" FN 498. (emphasis added)